Department of Labor and Industry
Board of Personnel Appeals
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 38-2010

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL No. 8, AFL-CIO Complainant, -vs- CITY OF GREAT FALLS, GREAT FALLS FIRE DEPARTMENT, Defendant,	INVESTIGATIVE REPORT AND NOTICE OF INTENT TO DISMISS

I. Introduction

On April 21, 2010, the International Association of Firefighters, Local No. 8, AFL-CIO, hereinafter Local No. 8 or Union, filed an unfair labor practice charge with the Board of Personnel Appeals alleging that the City of Great Falls, Fire Department, hereinafter the City, violated established ground rules by bringing a new item to the table after the second round of negotiations. Local No. 8 further contends that the City further violated Montana law by offering a "Last, Best and Final Offer" that was not an actual Last, Best and Final Offer. Violations of Sections 39-31- 401(1) and (5) are alleged by the Union.

On May 10, 2010, the City filed an answer to the charge denying that it had committed an unfair labor practice. Local No. 8 requested an opportunity to respond in writing to the answer of the City and did so on May 21, 2010.

The City is represented in this matter by City Attorney James Santoro and Local No. 8 is represented by Timothy McKittrick, attorney at law.

John Andrew was assigned by the Board to investigate the charge and has reviewed the information submitted by the parties and communicated with them as necessary in the course of the investigation.

II. Findings and Discussion

There is a long term bargaining history between the City and Local No. 8. The instant

complaint finds its roots in the bargaining for the successor agreement to a contract which expires on June 30, 2010. The parties began bargaining for a new agreement on January 20, 2010. Between that date and February 25, 2010, when the City issued its last, best and final offer, the Union and the City met on five occasions and exchanged proposals and counter proposals. It is on February 25, 2010, that the City made a proposal concerning retroactivity that is at the heart of this complaint. The Union contends that proposal violated bargaining ground rules agreed upon on January 20, 2010, in that retroactivity was not addressed by the end of the second negotiation session and thus, when the City addressed retroactivity it was a new proposal. The Union contends that since retroactivity was not brought up in a timely manner retroactivity was an automatic and it should be to the date a successor contract will commence – presumably July 1, 2010.

Beyond the issue of retroactivity Local No. 8 contends that despite the fact that the City made a written last, best and final offer on February 25, 2010, the City Manager nonetheless brought up the possibility of further discussion about the 2010 contract and the last, best and final offer. This too is an unfair labor practice according to the Union.

In addressing the issue of retroactivity the Union has submitted a history of the most recent negotiations for the 2010 contract as well as notes from two previous contract negotiations. Based on those notes supplemented by conversations with Union and City officials, it seems as though bargaining for the 2005 contract began on March 25, 2005. Entailed in this round of bargaining was the use of interest based bargaining techniques as well as the use of State and Federal personnel as mediators and/or facilitators. In total some 13 sessions were held. Retroactivity was the first and highest rated priority of the Union during the 2005 round of negotiations. There is nothing in the documents provided to the investigator, nor could the Union point the investigator to any agreement that bound the City to automatic retroactivity or an effective date for retroactivity on any individual item in the contract or the entire contractual terms for other than what was agreed to for the 2005 round of bargaining. Ultimately the parties resolved their 2005 contract in late August of 2005 with a retroactive date to July 1, 2005.

In bargaining for the 2008 contract, the successor to the 2005 contract, the parties first met in February of 2008. They then bargained for 11 sessions with the City issuing its last, best and final offer on June 9, 2008. The parties then went through two mediation sessions with an agreement reached in September of 2008. In the 2008 round of bargaining retroactivity was agreed upon as being effective to July 1, 2008. As with the 2005 bargaining the Union could not point to any agreement on the part of the City to either make retroactivity automatic in the future or automatic to any particular date in the future. Of note, per the previous negotiations in 2005, retroactivity was an offer contained in the Union proposals and seemed to be the first item on their agenda.

It is clearly demonstrated that in the past retroactivity was regularly bargained and, historically at least, it has been agreed upon by the parties to be effective July 1 of the first year of the agreed upon contracts. The history of bargaining between the City and Local No. 8 demonstrates that retroactivity has never been an automatic, but rather was

hammered out at the table either through facilitated methodologies or through traditional bargaining means. Nothing in the form of a memorandum of understanding, past or existing contract language, or bargaining history, including bargaining for the current agreement, establishes that the City ever agreed to automatic retroactivity, or a given date for retroactivity on any future contracts. The notes from a 4/12/2005 facilitated session between the Union and the City are instructive of the issue.

> The Union stated the City had agreed to retroactivity during the last negotiations, and asked why it was a problem this time. The City explained the full IBB process was used at the beginning of negotiations last time, and economic proposals had not even been exchanged at the time retroactivity was discussed. The City stated to date, the Union had economic proposals totaling approx. 23%, and there was just no way the city could agree to retroactivity to be all inclusive of all items such as overtime for all hire backs and time and one-half for all H's.

The point being, negotiations are always unique to each round of bargaining. Just as the Union can point to notes to establish its belief on the effective date for retroactivity on future contracts, so too can the City point to the same notes to support its position that retroactivity was always a subject of negotiations and never an automatic either in terms of there being retroactivity, the date to which it would be effective, or the elements in the contract to which it would apply in future contracts.

Turning to the second prong of the Union allegation – that the City bargained in bad faith when, for lack of a better term, it wavered, on its last, best and final offer. The City offers that, in fact, that offer still stands. Rather, the advance to the Union by the City Manager was made in order to clarify whether or not there was some previously not understood offer by Local No. 8 as related to the first year of a multi-year proposal. If what the City was asking for was clarification, or verification, that certainly is not an unfair labor practice. Additionally, if the City did make movement from its last, best and final offer (and the City did not) one would have to question why that would be an unfair labor practice as such an action, even if taken, and unless regressive in some fashion, would be of more prejudice to an employer claiming impasse than it would be to a labor organization. As this case sits, nowhere is it contended that the City was regressive in any of its proposals. Given that, it is unknown what damage was suffered by the Union, even if the employer styled "last, best and final offer" was not, in fact, a last best and final offer.

In addressing the allegation that bargaining ground rules were breached by bringing up retroactivity, a strong argument exists that retroactivity is such a key component of the economics of bargaining that bringing the topic up after the second session is not a new proposal, but rather an inherent part of existing proposals. Moreover, since it is a prospective issue not relevant until contract expiration, retroactivity is perhaps a unique topic in that it does not become an issue until, in this case, the latter stages of bargaining. Then, addressing retroactivity is arguably as much a question of notice as opposed to being a new issue. Granted, as offered by the Union, there may be a perceived element of coercion in how retroactivity is addressed by management, but

that is hard to see in the instant case, and given how much it has been discussed in the past and the sophistication of the negotiators that argument does not carry much weight. The investigator has all this in mind in considering the merits of this complaint.

The investigator is also mindful of perhaps a more overriding consideration that drives bargaining between firefighter unions and public employers, namely interest arbitration as the statutory method to resolve contract terms. It is a given that retroactivity was never brought up by either Local No. 8 or the City by the conclusion of the second bargaining session. Both parties to this matter have painted a picture that they wanted things wrapped up before the current contract expires thus making retroactivity, in an ideal world, a moot point. At this point in time agreement between the City and Local No. 8 is still a possibility before the current contract expires, but if not, should the silence on the part of both parties regarding retroactivity result in it being automatic and effective on July 1 as Local No. 8 would have? Or, as contended by the City, should whether or not there would be retroactivity and the date it would apply be something bargained at the table? Evidence submitted by the parties supports either scenario. Regardless of the position of the City and the Union in this matter, in the statutory context of interest arbitration, management and firefighter unions have foregone some of their bargaining rights, e.g. strikes and implementation, in exchange for an arbitrator deciding contractual, mandatory subjects of bargaining, including wages and thus retroactivity. The Board of Personnel Appeals, by ruling either for management or labor on a wage related matter, as is retroactivity, would usurp the authority placed with the arbitrator under Montana law. If the Board were to decide there were merit to the complaint of the Union, and here that is not an issue as the Union has shown no basis for its complaint and requested remedy, the Board would be prospectively resolving an issue appropriately left for the arbitrator to decide based on the totality of the proposals between the Union and the City coupled with the statutory standards for an arbitration award.

Regarding the last, best and final issue, again, if this were a traditional bargain, as opposed to one that is subject to final and binding interest arbitration, the whole question would take on a different light. It is not that the term “”last, best and final offer” has no meaning in the context of interest arbitration, but its meaning is more akin to impasse, with the result being a triggering of statutory remedies to resolve the impasse. That is precisely what has happened here. The parties are in mediation and then, if necessary, proceeding to final and binding interest arbitration. No prejudice to the Union can be identified by the investigator based on what happened. The reason offered by the City is highly plausible and understandable. The City merely wanted to ascertain whether or not it had missed something in the discussions that could lead to settlement. Ultimately the position of the employer has not changed. The parties still know where they are in terms of their proposals and in terms of overall negotiations and if they cannot reach agreement their path is set out in the statutory framework of 39-34-101 et seq. MCA.

III. Recommended Order

All evidence being considered, it is the recommended order of the investigator that ULP 38-2010 be dismissed as without merit.

DATED this 16th day of June 2010.

BOARD OF PERSONNEL APPEALS

By: _____
John Andrew
Investigator

NOTICE

Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss may be appealed to the Board. The appeal must be in writing and must be made within 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to dismiss becomes a final order of the Board.

CERTIFICATE OF MAILING

I, _____ , do hereby certify that a true and correct copy of this document was mailed to the following on the _____ day of _____ 2010, postage paid and addressed as follows:

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